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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Implement the Commission's Procurement Incentive Framework and to Examine the Integration of Greenhouse Gas Emissions Standards into Procurement Policies.	R.06-04-009

COMMENTS OF CONSTELLATION NEWENERGY, INC., CONSTELLATION ENERGY COMMODITIES GROUP, INC. AND CONSTELLATION GENERATION GROUP, LLC ON DRAFT DECISION OF PRESIDENT PEEVEY AND ALJ GOTTSTEIN ON PHASE 1 ISSUES

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Pursuant to Rule 14.3 of the California Public Utilities Commission ("CPUC") Rules of Practice and Procedure, Constellation NewEnergy, Inc., Constellation Energy Commodities Group, Inc., and Constellation Generation Group, LLC (collectively, "Constellation") hereby provide these comments on the December 13, 2006 *Proposed Decision of President Peevey and ALJ Gottstein*, *Interim Opinion on Phase 1 Issues: Greenhouse Gas Emissions Performance Standard*. ("Proposed Decision" or "PD").

Constellation actively participated throughout the workshop processes leading up to the Staff Workshop Report as well as other discussions with market participants. Constellation generally supports the implementation of the interim Emission Performance Standard ("EPS") as reflected in the PD, but makes certain suggestions for clarifications and improvements to the PD below. Consistent with Rule 14.3(c) attached at Appendix A are redlines of corrections recommended in these comments.

I. The PD Adopts Positions That Will Harm Commercial Transactions and Impede Regional Wholesale Market Operations.

The PD grapples extensively with the problem of how to determine EPS compliance for "unspecified contracts" that trigger the gateway (i.e, are for baseload generation and five years or longer in term), but are not specific as to the underlying generating resource. Finding none of the alternative, proxy-based approaches discussed during the proceeding to be satisfactory, the PD simply prohibits LSEs from entering into unspecified contracts if those transactions would otherwise trigger the gateway review. While Constellation appreciates that imputing emissions when there is no specified emitting resource is a difficult issue, the PD adopts a policy position that has undesirable, collateral impacts on the marketing of power both within California and throughout the larger region. For instance, this policy decision may have the unintended consequence of foreclosing inter-regional energy exchanges such as those held by utilities today. This policy decision will also likely have a negative effect on the development of transparent and robustly competitive forward energy price signals because it directly undermines the use of existing fungible energy commodity products for long-term commitments. This erases the ability of marketers to optimize delivery commitments and essentially forces the market into unit-contingent transactions.

As demonstrated during the workshops, there has been little multi-year contracting by LSEs that is not unit-specific at this time. Therefore, Constellation recommends a more measured approach to the issues of applying the EPS to unspecified contracts. The Commission should simply monitor the annual attestation submissions to determine the extent to which LSEs enter into longer-term unspecified contracts. If this monitoring activity suggests that unspecified contracts are actually tied to EPS violating generation sources, the Commission could then take steps to address this concern, rather than introducing such a sweeping and generic prohibition on

unspecified contracts and disrupting the regional marketplace. This measured approach carries little risk that there could be any significant backsliding at this time because of the ongoing review of IOU procurements, as well as this newly emerging EPS compliance.

If the Commission does not modify this element of the PD now, then Constellation respectfully requests that the Commission at least commit to an annual review of the impact that the unspecified contract prohibition is having on the market so that a subsequent and more refined correction can be evaluated and adopted, if needed.

II. Minor Corrections and Clarifications to the PD Are Needed.

Constellation supports the overall direction of the PD with respect to establishing the EPS to bridge GHG policies and prevent backsliding in emissions reductions as AB 32 is implemented. As with any effort of this magnitude, there are certain corrections and clarifications to the PD that are needed to avoid ambiguities and misinterpretations.

A. Annual Attestation Process

Constellation supports the annual "attestation" mechanism embraced in the PD as the mechanism by which Electric Service Providers ("ESPs") would demonstrate compliance with the EPS. Constellation requests, however, minor clarifications and modifications so that this process does not create unnecessary, burdensome requirements for ESPs. Specifically, the PD should be modified to eliminate the requirement for ESPs to file and serve the Attestation Letter as a formal advice letter which in turn provides parties with an opportunity for protests and responses. Constellation does not believe that applying the formal advice letter process to these submissions materially adds to their review, particularly as the PD makes clear that the "Energy Division shall review the advice letters and approve them if the attestation is in compliance" [1]

[1] See PD, page 133.

with the adopted attestation rules but "does not establish any other matters (e.g., it does not determine that particular plants are in actual compliance with the EPS or that financial commitments not fully disclosed in the attestation are in compliance with this decision)."[2] Moreover, the PD specifically states that ESPs "shall be subject to penalties if the attestation letters are found, at a later date, to be incomplete, misleading, or incorrect",[3] highlighting the already existing obligation to make accurate submissions.

Since the Energy Division will review the Attestation Letter compliance submission to determine if it has been completed properly, Constellation believes that the Energy Division's review of the Attestation Letter, coupled with the prospect of penalties to be levied on an ESP if the Attestation Letter is later deemed to be incomplete or otherwise deficient, provide ample safeguards rendering the additional advice letter requirement wholly unnecessary. Lastly, this clarification will maintain consistency with prior Commission actions and maintain the jurisdictional distinctions between public utilities and ESPs.

B. Documentation requirements require clarification.

Section 5.5 of the PD outlines the documentation requirements for the "compliance submittals." In the case of ESPs, this would include information on executed "covered transactions", and apparently transactions not subject to the EPS. Two clarifications are needed concerning: (1) confidential treatment of procurement-related data; and (2) the policy standard with respect to shorter-term transactions becoming subject to the EPS and therefore potential penalties.

[2] See PD, page 133.

[3] See PD, page 134.

1. Clarification concerning maintenance of confidential data.

D.06-06-066 adopted an "ESP Matrix" that provides protection for certain ESP information.[4] The PD calls for submission of information regarding transactions that are covered by the ESP Matrix, and Ordering Paragraph No. 18 addresses confidentiality generally. Constellation requests clarification that when it makes its annual compliance submission to the Energy Division that confidentiality of the information will be maintained where the ESP supports the confidentiality request consistent with existing processes, and that these types of EPS compliance submissions are to be deemed covered under the terms of the ESP Matrix. This would be consistent with the existing confidentiality mechanisms and access restrictions already in place for ESP annual and monthly compliance submissions in the RAR context.

2. Further clarification is needed with respect to if and when short term contracts can be subjected to the EPS.

Section 5.5 also includes a requirement that LSEs disclose all procurement with "the same supplier, resource or facility." PD at 142. The rationale for this requirement is:

> Disclosure of this information is necessary to ensure that LSEs do not circumvent the EPS rule by entering into a series of contracts with terms of less than five years with the same supplier, resource or facility. **Such multiple contracts should be considered a single commitment and be reviewed as such** (e.g., a contract for a three-year term link to a contract for the following three years must be seen as a single commitment of six years). Further, disclosure of LSE investments in retained generation, including "deemed-compliant" CCGTs, is also necessary to monitor compliance with the interim EPS rules. Therefore, we require all LSEs to disclose the investment amount and type of alteration to retained generation, by generation facility and unit. **As discussed above, electric service providers, community choice aggregators and small electrical corporations will need to provide this information in their annual Attestation Letter**.

PD, page 142, emphasis added.

[4] See, D.06-06-066 and the ESP Matrix, Item II [year ahead and month ahead RA compliance data and forecast] and IV(C) [bilateral contract terms].

Constellation seeks clarification as to when and under what circumstances an ESP's procurement would be subject to this *ex post* aspect of the EPS. As the Commission is well aware, all LSEs, including ESPs, are required to secure resource adequacy ("RA") capacity to meet their resource adequacy obligations. Those RA capacity resources may or may not also provide energy to the LSE. The current RA program design has the "qualifying" capacity levels of the resources set annually, and the RA program currently operates on a calendar year basis. It is reasonable to expect that LSEs that bilaterally negotiate for RA capacity will maintain existing commercial relationships going forward in order to reduce transaction costs associated with negotiating the non-standardized RA product, as well as to better manage their procurement position in light of customer commitments and other market changes. Accordingly, Constellation is concerned that the *ex post* EPS policy articulated in the PD will find that a series of contracts with the same counterparty for the same or similar resources is an attempt to "circumvent" the EPS, when in fact that procurement approach is the most rationale means of complying with the Commission's RA policies.

Take the following hypothetical as an example of the disruptive effect of this new *ex post* EPS review policy pronouncement: an ESP seeks RA capacity from the marketplace and gets a favorable response from the owner of an older, formerly baseload facility with qualifying RA capacity. This facility is not expected to operate any longer in baseload mode because of its relatively poor heat rate, but it could approach the 60% capacity threshold if various contingencies occur such as poor hydro conditions, extended nuclear outages and higher than expected system loads. The ESP wants a one-year RA contract for the capacity only, with no energy production commitment other than the availability obligation inherent in the RA product. Any energy produced by the facility would be the subject of a different transaction the resource

owner may strike with other entities inside or outside of California, or could come from a CAISO dispatch of the resource if and when system conditions require energy production. Because RA is not a fully standardized product, there are significant transactional costs for both buyer and seller when they negotiate the details of the bilateral RA contract. Therefore, in future years, these same parties would likely renew their existing commercial arrangement and avoid incurring new, significant transaction costs associated with negotiating contracts with new counterparties if they can reach a satisfactory new commercial arrangement with their existing counterparty. Yet the Commission's new *ex post* EPS review policy with respect to disclosure of transactions clearly outside the EPS gateway would undermine that commercial continuity because of a potential risk of imposing the EPS on the LSE by imputing a desire to circumvent the policy.

To rectify this conflict, Constellation suggests that the Commission focus on the statutory goal: requiring only that long-term financial commitments of five years or more meet the EPS. Moreover, because the statutory scheme for the EPS is clearly focused on longer-term financial commitments, the documentation requirement for short-term transactions should be removed. If, however, the Commission decides not to remove this documentation requirement, it must make clear when and why short-term transactions would be treated as long-term transactions subject to the EPS on a retroactive basis because this requirement injects new regulatory risks into the marketplace that must be addressed by the ESPs. Because the smaller LSEs rely to a greater extent on contracted supplies to meet distinct capacity and energy needs, the regulatory risk and burden is greater for these entities than the larger public utility electrical corporations.

Furthermore, if the Commission decides that it must nonetheless collect and analyze short-term procurement arrangements, the Commission must be clear as to the criteria that will

be used to analyze past procurements and deem them to be attempts at circumventing the EPS on an *ex post* basis. Those criteria must rely on clear and convincing evidence of contracts made between the LSE and a specific supplier entered with the intent of circumventing the existing EPS. In light of the RA procurement example above, Constellation believes that entities doing a series of RA capacity arrangements with no energy dispatching rights and durations under 3 years should not be at risk for an *ex post* EPS violation. However, if an LSE that enters a 4.5 year contract for capacity and energy with a supplier that cannot meet the EPS emission standard and then subsequently renews the contract for a similar term outside of any open competitive processes, it may rightfully be the subject of suspicion about the intent of the back to back transactions.

C. Clarification regarding definition of "unit" for purposes of the EPS.

Constellation suggests that the PD should seek to define the term "unit" in a manner that is consistent with the treatment of generation facilities under the Resource Adequacy ("RA") program and the design of the generation facilities. Specifically, Constellation notes that for purposes of RA, generation facilities are often aggregated under a CAISO Resource ID name, which may embrace certain units at the facility. For example, SCE's affiliated Mountainview unit is represented in the CAISO net qualifying capacity list in two power blocks of 484.5 MWs each (Resource IDs SBERDO_2_PSP3 and SBERDO_2_PSP4, respectively) where each block contains 3 "units" (two CTs and a HRSG).[5] Application of the EPS is logical at the aggregated power block level, but not at the individual "unit" level. Similar configuration issues arise for many other projects. Clarification is needed to avoid confusion with respect to the

[5] CAISO's NCQ listing is posted at http://www.caiso.com/1833/1833e95e5f760.xls, lines 579 and 580; See also CAISO's Master Listing of All CAISO Control Area Generating Capabilities, posted at http://www.caiso.com/14d4/14d4c6c961cc0.xls, lines 490-497.

implementation of the EPS. Constellation suggests that the EPS be applied to "units" as defined on CAISO's RA "net qualifying capacity" listing level of aggregation.

D. Correction is needed regarding Constellation's position on the use of offsets.

At page 138 of the PD there is a reference suggesting that Constellation does not support the use of offsets. This is an incorrect characterization of Constellation's position throughout the proceeding. Constellation views the EPS as a bridging mechanism only, intended to prevent backsliding pending development of a more robust, multi-sector approach. Constellation supports a GHG cap and trading approach that would allow the use of verified offsets to reach the most economically efficient means of quickly reducing GHG emissions, as most recently outlined in the issue statement made for the Phase 2 effort, and consistent with statements made in Phase 1. For example, in the July 27, 2006 post-workshop comments, Constellation stated:

> While Constellation is generally supportive of the use of offsets, the concept of using offsets is more applicable to an EPS that is applicable to the ongoing operations of a facility and is less applicable under a gateway approach. Nevertheless, offsets could have some applicability under the gateway approach proposed by Constellation herein especially if the price differential between high carbon content fuels and low carbon content fuels becomes excessive. In that fuel price environment, there will be a high amount of political pressure to relax the interim EPS standard. If that is done, namely if market conditions increase the pressure to use lower cost, but higher GHG emitting fuels, then offsets or other mitigation should be coupled with any cost "safety valve" to mitigate potential backsliding. Constellation would note that the offsets approach is implicit in the October Policy Statement discussion.

Similarly, in the September 18, 2006 reply comments on the draft workshop report Constellation stated:

> For example, a viable emission reduction trading and offsets program from which the R&D projects can secure the compliance credits necessary to achieve EPS compliance in light of the success

> of any GHG emission reductions provides a potential way to avoid GHG emission backsliding, and a means for the real costs of the project to be better managed and understood.

Accordingly, Constellation respectfully requests that the PD be corrected.

E. An erroneous reference to Constellation should be corrected.

There is an incorrect reference to "Constellation" at page 116 of the PD that should most likely be replaced with "Calpine". The context of the discussion is how to impute GHG emissions to unspecified contracts. As noted above, Constellation believes a prohibition on unspecified contracts is unwise and will disrupt the operation of the regional wholesale markets. Accordingly, Constellation respectfully requests the PD be corrected.

III. The Commission's Interpretation of Senate Bill ("SB") 1368 With Respect to Utility Retained Generation is Unnecessarily Narrow and Constrained

Constellation appreciates the Commission's recognition that Southern California Edison's ("SCE's") interpretation of SB 1368, which would have exempted any and all utility investment in existing utility-owned generation from the EPS, was fundamentally at odds with the plain language and the intent of SB 1368. However, Constellation believes the disparate treatment the PD adopts for utility retained generation versus non-utility owned generation should be evaluated against the same metric – whether the disparate treatment is consistent with the plain language and intent of SB 1368.

SB 1368's overall structure is focused on load serving entities and the imposition of the EPS on long-term procurement commitments with baseload generation. Pub. Util. Code §8341(a).[6] For purposes of the chapter, specific definitions are adopted in §8340. "Load serving entities" ("LSE") is a phrase defined at §8340(h) addressing entities "serving end-use customers"

[6] All references are to the California Public Utilities Code unless otherwise indicated.

which encompasses "electrical corporations" (as defined at §218) and "electric service providers" (as defined at §218.3 with additional caveats). "Electrical corporation" as used in the chapter is as already defined in the existing §218; a definition that is broader than "public utility" as defined in §216, but which is often assumed to differentiate one form of public utility from others (i.e., "electrical corporation" in §218 as opposed to a "pipeline corporation" (§228), "gas corporation" (§222), or "heat corporation" (§224)). However, for the purposes of this chapter, the Legislature created the "load serving entity" concept and drew differing jurisdictional lines as to the application and enforcement of the EPS.

When read as a whole, however, SB 1368's focus on LSEs in §8341(a) differs from the focus on the Commission's authority over those jurisdictional electrical corporations (entities that satisfy both §218 and §216) in §8341(b). §8341(a) is a statutory prohibition directed at LSEs. §8341(b), however, provides directives to the Commission in regard to its varying roles with respect to those LSEs over which it is given jurisdiction.

The issue Constellation raises is whether, with respect to the Commission's review of certain procurement decisions by the electrical corporations, the commitments to baseload generation assets held by electrical corporations that are also public utilities (and hence "LSEs") are to be given preferential status over baseload generation assets owned by other electrical corporations. Constellation believes that such a preference is inconsistent with the goals of the statute and should not be embraced by the Commission.

As it stands, the PD will allow two similar baseload units that differ only with respect to their ownership structures, to face very divergent treatment under the EPS. The utility-owned asset that does not now meet the EPS may continue to operate indefinitely, with no GHG emissions improvement pressures until and unless other capital improvements are proposed for

the asset, whereby the EPS would then be triggered. But in the case of the identical non-utility owned unit, its owners must make investments immediately to comply with the EPS just in order to be able to execute a contract to market the unit's output under a contract that exceeds five years in length, even when no other new investment in the facility is contemplated or supported by the new contract. While the PD specifically states that reliability and cost issues are well served "by not subjecting the millions of dollars in the LSE's already-built facilities to a standard that is being developed to prevent backsliding in LSE decisions made for future investments", the PD ignores the only "already-built facilities" that are protected under its interpretation are only those owned by the IOUs, not other non-LSE electrical corporations.[7] If SB 1368 can be read to provide an exemption to the EPS for one category of generation owners – the IOUs – there are simply no grounds for not providing the same exemption to other generation owners as well. Simply put, the PD fails to explain why the millions of dollars that have been invested by non-utility electrical corporations in existing generation should be any less eligible for an exemption from the EPS than is generation that is owned by an IOU.

Thus, while Constellation understands the PD's discussion of the statutory language, Constellation nonetheless urges the Commission to reconsider this issue and exercise its discretion in the implementation and enforcement of the EPS so as to avoid patently unfair and discriminatory market conditions between similar assets based solely on their ownership by electrical corporations that are also LSEs.

IV. Conclusion

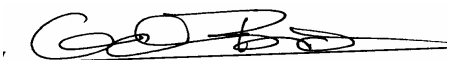
Constellation applauds the Commission's significant efforts in developing the EPS policies and implementation of SB 1368. For the reasons described herein, Constellation

[7] See PD, page 204.

suggests that certain clarifications and modifications be made. Appendix "A" includes revised findings of fact, conclusions of law and ordering paragraphs consistent with these recommendations.

Respectfully submitted,

January 2, 2007



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APPENDIX “A”

REDLINED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDERING PARAGRAPHS

Suggested Revisions to Findings of Fact:

24. The definition of covered procurements proposed by Constellation et al. would similarly subject the millions of dollars in ~~the LSE's~~ already-built facilities to a common standard that is being developed to prevent backsliding in GHG emissions due to LSEs' decisions made for future ~~investments~~ procurement, and to avoid the additional financial and reliability risks that such backsliding would create.

24a. The Commission will exercise its discretion to avoid preferentially treatment of assets owned by the public utility electrical corporations. Application of a EPS structure that is preferential to IOU-owned generation would have the unfortunate result of treating otherwise similar generating facilities differently based not upon their GHG emissions profiles, but rather solely by the ownership structure of those facilities.

24b. To address this potential for preferential treatment, the Commission will review rate-related proceedings addressing the ongoing cost recovery for utility retained generation to discern if there are ongoing long-term financial commitments made by the utilities that circumvent the intent of SB 1368, and particularly §8341(a).

***

134. Requiring all long-term commitments of any type (energy or capacity) with ~~for~~ baseload generation be made with "specified resources" that can demonstrate compliance with the interim EPS may have broader, detrimental implications for the regional wholesale energy market with little corresponding GHG benefit.~~is fully consistent with SB 1368. This approach ensures that "any" and "all" long-term financial commitments with baseload generation will meet the EPS, as the statute so directs.~~

135. SCE, SDG&E and PG&E did not enter into any contracts of five years or more for unspecified resources in 2004 and 2005 and state that they do not anticipate entering into any contracts with unspecified resources with a term of five years or more during the 2006-2008 procurement period. 136. Based on the record in this proceeding, it appears highly unlikely that LSEs will be entering into any significant levels of new or renewal power purchase contracts of five years or greater that are unspecified during the transition to a statewide GHG emissions limit.

137. Requiring all long-term Resource Adequacy capacity contracts with baseload generation be "specified" in order to demonstrate EPS compliance ~~should~~ will not have a significant, if any, impact on an LSE's resource procurement flexibility because the Commission's Resource Adequacy program only recognizes procurement of qualifying unit-specific capacity.

137a. Creating a blanket prohibition on unspecified contracts for the provision of energy may disproportionately impact those LSEs that primarily rely upon contracts for their energy needs, and may undermine the operation of the wholesale power market. In light of our requirement

that all long-term capacity contracts be unit-specific, it is not necessary to extend a similar prohibition on energy transactions.

138. The ISO relies on specific information about the plant facility and its location provided by LSEs in their Resource Adequacy demonstrations in making system reliability determinations within the ISO control area; therefore, the requirement to specify the resources underlying long-term Resource Adequacy capacity contracts for the purpose of demonstrating EPS compliance is consistent with the type of information that the Commission and the ISO ~~also~~ already require~~s~~ for these reliability determinations.

139. A requirement that long-term power purchase contracts for capacity specify the underlying generation facilities for EPS compliance is consistent with our discussion of emissions registration in D.06-02-032 and represents a logical interim step towards the implementation of the statewide emissions cap under AB 32.

***

145. New procedural vehicles need to be established for LSEs that are not currently required to submit procurement plans or apply for Commission pre-approval of procurement contracts, that is, for community choice aggregators, electric service providers and the small public utility electrical corporations[22] (those other than PG&E, SCE and SDG&E).

***

148. The documentation and other requirements adopted in this decision provide reasonable safeguards against the risks to ratepayers of potential non-compliance by an LSE that files an after-the-fact compliance showing for long-term commitments, particularly given the potential for penalties or other sanctions for inaccurate or misleading submissions.

148a. The focus of EPS compliance is on long-term commitments, and our documentation and other requirements reflect this focus. However, if in the future the Commission seeks to review an LSE's shorter-term transactions to determine if efforts were made to circumvent the EPS, notions of fundamental fairness and due process require us to make clear the standards for any *ex post* or retroactive review of transactions that are outside the five year or longer timeframe.

148b. LSEs may be found to have violated the EPS if they undertake explicit arrangements with non-EPS compliant assets with the intention of circumventing the EPS. For example, an LSE that executes contracts that exceed three years with a standing commitment to renew that contract will be found to have violated the EPS. However, an LSE that renews short-term contracts with the same parties for the same facilities based upon legitimate independent business reasons (such as multiple one-year RA capacity contracts), even if the renewals ultimately exceed five years in aggregate, will not be found to have circumvented the EPS.

***

150. An annual Attestation Letter, filed with the Energy Division ~~as an advice letter with opportunity for response/protest~~, is a reasonable procedural vehicle for community choice

aggregators, electric service providers and small electrical corporations to use for documenting after-the-fact compliance with the interim EPS standard.

151. As discussed in this decision, an electric service provider, community choice aggregator or small public utility electrical corporation should also be permitted to file with the Energy Division ~~an Advice Letter~~ requesting Commission pre-approval of a new financial commitment as EPS compliant.

162. Disclosure of short-term contracts is not necessary to ensure that LSEs do not circumvent the EPS rule. ~~by entering into a series of contracts with terms of less than five years with the same supplier, resource or facility~~. Absent information indicating an intent to circumvent the EPS, the Commission will focus only on long-term commitments. Because of the substantial transaction costs associated with bilaterally negotiated transactions, such as RA capacity contracts, it is reasonable to expect existing contracting parties to pursue renewal of those commitments if, near the time of the existing contract's expiration, there is a rationale business reason to do so. If, however, parties execute contracts with durations near the five year threshold and also commit well in advance of their expiration to renew the commitment, this will be viewed as an attempt to circumvent the EPS. To provide clarity as to when retroactive application of the EPS may occur for transactions shorter than 5 years, we will provide a "safe harbor" for transactions of three or fewer years. . ~~to Such multiple contracts should be considered a single commitment and must be reviewed as such (e.g., a contract for a three-year term linked to a contract for the following three years must be seen as a single commitment for 6 years)~~.

***

166a. For purposes of determining the capacity factor or the emission profile of a "unit" pursuant to the EPS, it is reasonable to use the aggregated units' resource identifications ("RES_ID") listed in the CAISO's net qualifying capacity listing that identifies generating capacity used to satisfy the Commission's resource adequacy requirements, rather than the individual unit generating components. We find that these aggregated components reflect the "designed and intended" asset that is to be operated as a single unit, consistent with the intent of the statute.

***

190. In developing the interim EPS, the Commission has considered the effects on reliability and overall costs to electric customers in the following ways: ***

c. By ~~not~~ similarly subjecting the hundreds of millions of dollars in the ~~LSE's~~ already-built facilities to a common standard that is being developed to prevent backsliding in GHG emissions due to LSE s' decisions made for future ~~investments~~ procurement.

Suggested Revisions to Conclusions of Law:

4. We agree with Constellation that ~~is not reasonable~~ in light of the plain language and intent of SB 1368, the Commission should avoid results that provide preferential treatment for generation assets that are owned by public utilities. A preferential structure will have the unfortunate result of treating otherwise similar generating facilities differently based not upon their GHG emissions profiles, but rather solely by the ownership structure of those facilities. This discriminatory impact can be remedied by reviewing the ongoing recovery of existing utility-owned generation in utility rates to discern whether §8341(a) is being circumvented over time.~~and the objectives of this Commission and the Legislature for an interim EPS, and should be rejected.~~

***

8. As discussed in this decision, we are compelled to exclude~~ing~~ retained generation from EPS-covered procurements (unless a review is triggered by a new "long-term financial commitment" as defined under SB 1368) ~~is fully consistent with~~ under the principles and objectives for an interim EPS articulated by the Legislature~~ and this Commission~~.

***

17. For the reasons discussed in this decision, generating units (as identified by different CAISO resource identifications listed for resource adequacy net qualifying capacity purposes) utilizing different resources or technologies, no matter if they are at the same location or contracted for under the same purchase power agreement, must each be evaluated separately for the purpose of evaluating whether the resource operates as baseload generation and, if so, whether its emissions rate complies with the EPS.

***

37. For the reasons discussed in this decision, it is reasonable and consistent with the intent of SB 1368 to require for the interim EPS rules that LSEs specify all generation facilities underlying long-term resource adequacy capacity power purchase contracts subject to the EPS.

***

41. No ~~after-the-fact Attestation Letter or Advice Letter~~ request for preapproval of covered procurements submitted to the Energy Division by electric service providers or community choice aggregators in compliance with the Interim EPS Rules should be "deemed approved~~,~~" without explicit action by the Energy Division.~~ as may be permitted under the Commission's current or future Advice Letter procedures in R.98-07-038 or R.06-05-027, or their successor proceedings.~~

Suggested Revisions to Ordering Paragraphs

4. All LSEs other than PG&E, SCE and SDG&E are required to file annual Attestation Letters, due by February 15 of each year, attesting to the Commission that the financial commitments entered into during the prior calendar year are in compliance with the EPS. The

Attestation Letter shall include a certification, including the name and contract information for the LSE officer(s) certifying the following under penalty of perjury:

A. I have reviewed, or have caused to be reviewed, this compliance submittal.

B. Based on my knowledge, information, or belief, this compliance submittal does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements true.

C. Based on my knowledge, information, or belief, this compliance submittal contains all of the information required to be provided by Commission orders, rules, and regulations.

The Attestation Letter shall be filed with the Energy Division, similar to the process used for resource adequacy filings.~~as an advice letter and served on the service list in this proceeding, or its successor proceeding. The Attestation Letter shall be subject to the Commission procedures governing advice letter filings, which include opportunity for protests and responses. However, no Attestation Letter shall be "deemed approved" under those procedures.~~ Energy Division shall review the Attestation Letters and approve them if the attestation is in compliance with the Interim EPS Rules. Energy Division approval of the Attestation Letter shall only mean that the attestation is in compliance with these rules, and does not establish any other matters, e.g., it does not determine that particular plants are in actual compliance with the EPS or that financial commitments not fully disclosed in the attestation are in compliance with this decision. These LSEs shall be subject to penalties if the attestation letters are found, at a later date, to be incomplete, misleading or incorrect.

5. Except as otherwise directed under Ordering Paragraphs 6, 7 and 8, LSEs other than PG&E, SCE and SDG&E may, at their discretion, submit ~~advice letters~~ during the year informal request~~s~~ing for pre-approval of a new financial commitment as EPS compliant to the Energy Division~~, at their discretion~~. These requests for review shall be advisory in nature only and will not result in public release of confidential procurement information.~~advice letter filings, as well as any responses or protests, shall be served on the service list in this proceeding or its successor proceeding. The advice letter shall be subject to the Commission procedures governing advice letter filings, which include opportunity for protests and responses. However, no advice letter submitted for this purpose shall be "deemed approved" under those procedures.~~

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11. In addition to other documentation required by this decision, all LSEs shall disclose the following information:

A. Any multiple contracts of ~~less~~ more ~~than~~ ~~five~~ three years with the same ~~supplier, resource or facility~~unit, and ****

***

12. The ~~advice letter~~ procedures for the annual Attestation Letters and other compliance submittals described in this decision are adopted for the limited purpose of EPS compliance. In the event that some clarifications or modifications to the advice letter ~~se~~ procedures for public utility submissions may need to be made after the effective date of this decision in order to

reconcile them with updated Commission procedures for advice letter filings in R.98-07-038 or R.06-05-027, or their successor proceedings, the Assigned Commissioner shall provide such clarifications or modifications by ruling or other manner, in consultation with the assigned Administrative Law Judge (ALJ) and Energy Division.

18. Any LSE that seeks confidentiality protection for data contained in its EPS-related submittals shall follow the policies and procedures set forth in D.06-06-066, and the EPS-related data will be subject to the same treatment provided to resource adequacy-related data.

Certificate of Service

I hereby certify that I have this day served a copy of *Comments Of Constellation NewEnergy, Inc., Constellation Energy Commodities Group, Inc. And Constellation Generation Group, LLC On Draft Decision Of President Peevey And ALJ Gottstein On Phase 1 Issues* on all known parties to R.06-04-009 by transmitting an e-mail message with the document attached to each party named in the official service list. Parties without e-mail addresses were mailed a properly addressed copy by first-class mail with postage prepaid.

Executed on January 2, 2007 at Sacramento, California

/s/

Eric Janssen

R.06-04-009
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January 2, 2007

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